No. 160

In The

Supreme Court of the United States

October Term, 1955

American Trucking Associations, Inc., et al., *Appellants*

v.

Frozen Food Express, et al., *Appellees*

Appeal from the United States District Court for the Southern District of Texas, Houston Division

STATEMENT AS TO JURISDICTION

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INDEX

CITATIONS

Court Cases

I. C. C. Cases

Statutes

No.

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STATEMENT AS TO JURISDICTION

In compliance with Rule 15 of the Revised Rules of the Supreme Court of the United States, American Trucking Associations, Inc., and the Common Carrier Conference Irregular Route and the Contract Carrier Conference thereof submit herewith their statement particularly disclosing the basis upon which the Supreme Court of the United States has jurisdiction on appeal to review the judgment of the district court entered in the cause.

OPINION BELOW

The opinion of the United States District Court for the Southern District of Texas, Houston Division, is reported at 128 F. Supp. 374 and a copy is appended hereto (Appendix A). A copy of the final judgment of the district court also is appended (Appendix B). The re-

port of the Interstate Commerce Commission in Docket No. MC-C-968, *Determination of Exempted Agricultural Commodities*, is reported at 52 M.C.C. 511.

JURISDICTION

1. *Nature of proceeding below*

The action in the district court was brought to suspend, enjoin, annul and set aside the report of the Interstate Commerce Commission in Docket No. MC-C-968, *Determination of Exempted Agricultural Commodities*, pursuant to Section 205(g) of the Interstate Commerce Act, 49 U.S.C. §305(g), Section 10 of the Administrative Procedure Act, 5 U.S.C. §1009, and Sections 1336, 1398, 2284 and 2321 to 2325, inclusive of the Judicial Code, 28 U.S.C. §§1336, 2284, 1398 and 2321-2325.

2. *Dates of proceeding below*

Judgment of the United States District Court for the Southern District of Texas, Houston Division, was rendered February 23, 1955, and notice of appeal was filed in said Court on April 20, 1955.

3. *Statutory provisions conferring jurisdiction*

The jurisdiction of the Supreme Court of the United States to review the decision of the district court on direct appeal is conferred by Sections 1253 and 2101(b) of the Judicial Code, 28 U.S.C. §§1253 and 2101(b).

4. *Cases sustaining jurisdiction*

The jurisdiction of the Supreme Court of the United States to review the decision of the district court on direct appeal is sustained by *El Dorado Oil Works* v. *United States*, 328 U.S. 12; 66 S.Ct. 843. See also *King* v. *United States*, 344 U. S. 254, 260, 73 S.Ct. 259, 263;

Swift & Co. v. *United States*, 343 U.S. 373, 376, 72 S.Ct. 716, 718; *Radio Corp. of America* v. *United States*, 341 U.S. 412, 414, 71 S.Ct. 806, 807, and other cases.

QUESTION PRESENTED

Did the United States District Court for the Southern District of Texas err in its judgment rendered February 23, 1955 (Appendix B), dismissing the complaints filed in Civil Action No. 8285, *Frozen Food Express, et al.* v. *United States, et al.*, for the reason set forth in the Court's opinion filed January 26, 1955 (Appendix A), that the order of the Interstate Commerce Commission, dated April 13, 1951, in Docket No. MC-C-968, *Determination of Exempted Agricultural Commodities*, 52 M.C.C. 511, sought by the plaintiffs to be set aside and enjoined, is not an order subject to judicial review under Section 205(g) of the Interstate Commerce Act, 49 U.S.C. §305(g), Section 10 of the Administrative Procedure Act, 5 U.S.C. §1009, and Sections 1336, 1398, 2284 and 2321 to 2325, inclusive, of the Judicial Code, 28 U.S.C. §§1336, 1398, 2284, and 2321-2325, although the Commission in said proceeding classified certain processed agricultural commodities as being embraced within the exemption of Section 203(b)(6) of the Interstate Commerce Act, 49 U.S.C. §303(b)(6), and hence transportable by motor vehicles not subject to economic regulation by the Commission and classified other such processed agricultural commodities as being beyond the scope of the exemption of Section 203(b)(6) and thus able to be carried only in Commission-regulated motor vehicles?

STATEMENT

Section 203(b) of the Interstate Commerce Act, 49 U.S.C. §303(b), provides, in part, as follows:

> Nothing in this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment shall be construed to include . . . (b) motor vehicles used in carrying property consisting of ordinary livestock, fish (including shell fish), or *agricultural (including horticultural) commodities (not including manufactured products thereof)*, if such motor vehicles are not used in carrying any other property, or passengers, for compensation; . . . [Emphasis added.]

The task of administering and enforcing the provision of the Act is that of the Interstate Commerce Commission. Section 204(a)(6), 49 U.S.C. §304(a)(6), *McLean Trucking Co.* v. *U. S.*, 321 U.S. 67, 79, 64 S.Ct. 370, 377. For years the Commission determined item by item, as the question arose, what products were agricultural commodities within the terms of the exemption of Section 203(b)(6), *Settle Common Carrier Application*, 46 M.C.C. 277 (eggs), *Severson Common Carrier Application*, 46 M.C.C. 6 (whole, skim and standardized milk and cream), *Newman Contract Carrier Application*, 44 M.C.C. 190 (apples), *Derr Contract Carrier Application*, 43 M.C.C. 437 (raw milk), *Dougherty Common Carrier Application*, 31 M.C.C. 793 (mushrooms), *Post Contract Carrier Application*, 13 M.C.C. 139 (potatoes), *Hubbs Common Carrier Application*, 6 M.C.C. 708 (peas), *Dimmick Common Carrier Application*, 6 M.C.C. 697 (peas), *Ramsey Contract Carrier Application*, 6 M.C.C. 647 (cream), *Phelps Common Carrier Application*, 6 M.C.C. 629 (peas), *Akes Common Carrier Application*, 6 M.C.C. 543 (peas), *Harris & Callis Contract Carrier Application*, 4 M.C.C. 169 (peanuts), *Bowen Common Carrier Application*, 3 M.C.C. 655 (fresh fruits and vegetables), *Zambroski Common Carrier Application*, 3 M.C.C. 610 (fresh fruits and vegetables), *Le Compte Common Carrier Application*, 3 M.C.C. 241 (fresh corn, tomatoes and beans), *Williams Contract Car-*

rier Application, 2 M.C.C. 685 (fresh fruits and vegetables), *Clemence Contract Carrier Application*, 2 M.C.C. 292 (fresh melons and sweet potatoes), *Stone Contract Carrier Application*, 2 M.C.C. 259 (fresh fruits and vegetables), *Cavallaro Common Carrier Application*, 2 M.C.C. 65 (fresh fruits and vegetables), *Janesofsky Common Carrier Application*, 1 M.C.C. 799 (grain), *Pohl Contract Carrier Application*, 1 M.C.C. 707 (milk and cream), and what products were manufactured agricultual commodities, *Harwood Contract Carrier Application*, 47 M.C.C. 597 (vegetable salads and washed spinach in cellophane bags), *Monark Egg Corporation Contract Carrier Application*, 44 M.C.C. 15 (shelled nuts and dressed poultry), *Newton Extension of Operations—Frozen Foods*, 43 M.C.C. 787 (frozen fruits and vegetables), *McCann Common Carrier Application*, 42 M.C.C. 61 (frozen fruits and vegetables), *McCarty Common Carrier Application*, 32 M.C.C. 615 (dressed poultry), *W. H. Tompkins Common Carrier Application*, 29 M.C.C. 359 (packing house products), *Allen Common Carrier Application*, 28 M.C.C. 26 (dressed poultry), *Lard and Vegetable Oil etc.*, 26 M.C.C. 135 (lard), *Hausman Extension—Morton, Ill.*, 20 M.C.C. 641 (meat and lard), *Battaglia Common Carrier Application*, 18 M.C.C. 167 (dressed poultry, butter and cheese), *Luckey Common Carrier Application*, 12 M.C.C. 739 (pasteurized milk), *Dugan Contract Carrier Application*, 7 M.C.C. 15 (clean rice, rice bean and rice polish), *Harris & Callis, supra* (ground peanut shells), *Pohl, supra*, (cream cheese and cottage cheese), *Juett Contract Carrier Application*, 1 M.C.C. 268 (oleomargarine).

The need for a comprehensive investigation of the meaning and scope of the partial exemption of Section 203(b)(6) having become apparent and the Secretary of Agriculture of the United States having petitioned for a general investigation, the Commission, by notice dated

June 21, 1948, initiated on its own motion a proceeding, docketed as No. MC-C-968, *Determination of Exempted Agricultural Commodities,* to define the words "agricultural commodities (not including manufactured products thereof)" as they appeared in that section. After extensive hearings, covering 1,509 pages of testimony, the filing of exceptions to the examiner's proposed report and replies thereto and oral argument before the entire Commission, the Commission on April 13, 1951, issued its order discontinuing the proceeding.

The order expressly referred to and incorporated the concurrent report of the Commission containing its findings of fact and conclusions thereon. The Commission found, *inter alia,* that

> . . . the term "agricultural commodities (not including manufactured products thereof)" as used in section 203(b)(6) of the Interstate Commerce Act means: Products raised or produced on farms by tillage and cultivation of the soil (such as vegetables, fruits, and nuts); forest products; live poultry and bees; and commodities produced by ordinary livestock, live poultry, and bees (such as milk, wool, eggs, and honey), but not including any such products or commodities which, as a result of some treatment, have been so changed as to possess new forms, qualities, or properties or result in combinations. [52 M.C.C. 557.]

The Commission listed 14 commodities or groups of commodities in varying states of production which it deemed to be "agricultural commodities (not including manufactured products thereof)" as used in Section 203 (b)(6). The list did not include, among other products, fresh or frozen meat, fresh or frozen dressed poultry, feathers, shelled nuts and cotton seed hulls, the Commission, unlike the examiner, having concluded with respect to these commodities that for one reason or another they

were not embraced within the partial exemption of Section 203(b)(6).

In the subject proceeding before the district court a motor common carrier sought to have the Commission's report and order in the *Determination* case enjoined, annulled and set aside insofar as it declared fresh or frozen meat, fresh or frozen dressed poultry, feathers, shelled nuts, and cotton seed hulls, among other products, not to be embraced within the partial exemption of Section 203(b)(6). By its order of February 23, 1955, set out in Appendix B hereof, the district court dismissed the complaint. The reason for dismissing the complaint as stated in the court's opinion, dated January 26, 1955, and quoted in its entirety in Appendix A hereof, was that "the report and order of the Interstate Commerce Commission of April 13, 1951, is not an 'order' subject to judicial review under any of the statutes cited."

SUBSTANTIALITY OF QUESTION

The question presented by this appeal is important to the maintenance of a stable national transportation system by motor vehicles, efficient and adequate to meet the needs of commerce, the postal service and the national defense. National Transportation Policy, 49 U.S.C. preceding §1.

The decision of the district court has rendered the Commission's report and order in the *Determination* case impotent. Stripped of the vitality that court review of the decision would have imparted, the report and order stands barren, without purpose or meaning.

If sustained the district court's decision would require the status of each agricultural commodity as falling within or beyond the scope of the partial exemption of Section 203(b)(6) to be litigated before the courts, including

the Supreme Court of the United States. Uncertainty would pervade this important segment of the transportation industry so long as law suits could be brought.

However, as the decision of the district court clearly is contrary to the law as well-established by the decisions of the Supreme Court of the United States, it should be reversed. As reasons therefor appellant says:

1. *The decision of the district court is contrary to the law.*

The mere reading of the reasoning of the district court leading to the dismissal of the complaint discloses the error of law that was committed by the court. In support of its conclusion that the report and order of the Commission in the *Determination* case was not an "order" subject to judicial review the court said:

> The proceeding before the Commission was not an adversary one. The order which initiated it purported to do no more than direct that an investigation be made of the meaning of the statutory language. Notice was given only to the public. When the final report and order was forthcoming some two years later, the only "order" entered was one discontinuing the proceeding and removing it from the Commission's docket. The question is controlled by *U. S.* v. *Los Angeles R.R. Co.* (273 U.S. 284), holding a very similar "order" of the Interstate Commerce Commission which found, after an investigation, the value of certain railroad properties, not to be subject to review. The language of Mr. Justice Brandeis, speaking for a unanimous Court there, aptly describes the order in issue here:
>
> > "The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, any thing; which does not grant or withhold any authority, privilege or license; which does not extend or abridge any power or facility; which does not subject the car-

> rier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation. This so-called order is merely the formal record of conclusions reached after a study of data collected in the cause of extensive research conducted by the Commission, through its employees. It is the exercise solely of the function of investigation."

The situation presented by this appeal clearly is distinguishable from that of the *Los Angeles* case. The Commission's report and order in the *Determination* case has been binding upon the motor-carrier industry. Following the decision many motor carriers undertook to transport commodities formerly considered as subject to regulation under the Interstate Commerce Act. *Increases, Pacific Northwest,* 54 M.C.C. 125, 127. Conversely, many motor carriers that previously had engaged in the transportation of products found to be manufactured agricultural commodities in the *Determination* case either ceased transporting such products or filed applications with the Commission for certificates or permits authorizing such transportation. See *Cosgrove and Demers Extension—Central States,* 53 M.C.C. 365.

Motor carriers who have continued to transport, without authority, products that the Commission found in its report and order in the *Determination* case to be manufactured agricultural commodities have violated Section 206 and Section 209 of the Act, respectively. 49 U.S.C. §§306 and 309. They have been ordered by the Commission, pursuant to Section 204(c) of the Act, 49 U.S.C. §304(c), to cease and desist from continuing such unlawful transportation. *Dart Transit Co.—Investigation of Operations,* 54 M.C.C. 429, sustained, *Dart Transit Co.* v. *Interstate Commerce Commission,* 110 F.Supp. 876, affirmed, *per curiam,* 345 U.S. 980, 73 S.Ct. 1138, *East Texas Motor Freight Lines, Inc.* v. *Frozen Food Express,*

62 M.C.C. 648, sustained in part, *Frozen Food Express* v. *United States*, 128 F. Supp. 374. They have been sued by the Commission for injunctions to restrain their further violations of the Act, Section 222(b), 49 U.S.C. §322(b), *I.C.C.* v. *Allen E. Kroblin, Inc.*, 113 F.Supp. 599, affirmed 212 F.(2d) 555, *I.C.C.* v. *Wagner*, 112 F. Supp. 109, *I.C.C.* v. *Yeary Transfer Co.*, 104 F. Supp. 245, affirmed 202 F.(2d) 151, and they have been criminally prosecuted and convicted under Section 222(a) of the Act, 49 U.S.C. §222(a). *Southwestern Trading Co.* v. *U. S.*, 208 F. (2d) 708.

Furthermore, in passing upon applications for motor common carrier authority filed pursuant to Section 207 of the Act, 49 U.S.C. §307, or applications for motor contract carrier authority filed pursuant to Section 209, 49 U.S.C. §309, the Commission has given effect to its report and order in the *Determination* case. *Direct Transit Lines, Inc., Extension*, 62 M.C.C. 231, *Valleskey Common Carrier Application*, 62 M.C.C. 228.

The report and order in the *Determination* case was more than a mere "press release." The findings embodied therein "must be taken by those entitled to rely upon them as to what they purport to be—an exercise of the delegated legislative power—which, until amended, are controlling alike upon the Commission and all others whose rights may be affected by the Commission's execution of them." *Columbia Broadcasting System* v. *United States*, 316 U.S. 407, 422, 62 S.Ct. 1194, 1202. That they were embodied in an investigatory proceeding rather than a rule-making one is immaterial. "The particular label placed upon it by the Commission is not necessarily conclusive, for it is the substance of what the Commission has purported to do and has done which is decisive" *Columbia Broadcasting System* v. *United States*, *supra*, at 316 U.S. 416, 62 S.Ct. 1200.

Nor is the effect of the Commission's order diminished by the fact that it was addressed to no specified carrier. It would be unrealistic to contend that because the Commission ordered no particular motor carrier to change its course of conduct, relief against what the Commission actually did is unavailable. This Court long has granted relief to parties claiming injury from an alleged unlawful public action, although such action made no direct demands upon them. *Joint Anti-Facist Refugee Committee* v. *McGrath*, 341 U.S. 123, 141, 71 S.Ct. 624, 633.

Directly in point are two decisions of the Supreme Court of the United States and a decision of the United States District Court for the District of New Jersey in which judicial review under the cited statutes or preceding legislation was had of orders of the Interstate Commerce Commission that suffered all or some of the technical deficiencies that the district court found in the subject proceeding to be fatal.

The Commission's report and order in *Allowances for Privately Owned Tank Cars*, 258 I.C.C. 371, was not rendered in an adversary proceeding. The order which initiated the proceeding purported to do no more than direct that an investigation be made into the lawfulness of certain practices. When the final report and order was forthcoming some four years later, the only "order" was one discontinuing the proceeding and removing it from the Commission's docket.

Nevertheless the Supreme Court of the United States in *El Dorado Oil Works* v. *U. S.*, *supra*, reversed the judgment of the district court dismissing the action for want of jurisdiction on the ground that the Commission's action did not amount to a reviewable "order." This Court said, at 328 U.S. 18, 66 S.Ct. 846:

> . . . the Commission's findings and determination if upheld constitute far more than an "abstract declaration." "Legal consequences" would follow which would finally fix a "right or obligation" on appellants' part. These findings are more than a mere "stage in an incomplete process of administrative adjudication", for the Commission has discontinued further proceedings.

Similarly in *Powell* v. *United States*, 300 U.S. 276, 284, 57 S.Ct. 470, 475, the contention was made that the antecedent Commission order in *Pollard, Receiver*, v. *Fort Benning R. Co.*, 206 I.C.C. 362, striking a certain tariff from the Commission's files, was not reviewable under the statute because it was not directed to any party; it required no one to do or to refrain from doing any act; it could not be enforced, obeyed or disobeyed; it did not speak to the future or contemplate any future effect because, on and after the date it was made, it had no significance "except as a record of a certain completed act performed by the Commission."

The Supreme Court rejected the contention, saying at 300 U.S. 285, 57 S.Ct. 475:

> . . . overemphasis upon the mere form of the order may not be permitted to obscure its purpose and effect. . . . Interpreted according to its purpose, the order is in substance and effect an affirmative one and therefore reviewable under the statute.

Finally the proceeding in the subject case and in Commission Docket No. MC-C-2, *New York, N.Y., Commercial Zone*, 1 M.C.C. 665, are startlingly similar from the standpoint of the judicial reviewability of the Commission's final order. Both were instituted as investigations by the Commission into the scope of the partial exemption of Section 203(b) of the Interstate Commerce Act—pertaining to agricultural commodities within the meaning of subparagraph (6) in the former and to the

New York Commercial Zone within the meaning of subparagraph (8) in the latter. Neither proceeding was an adversary one. In both cases notice was given only to the public; no carrier or carriers were named as respondents in the proceedings. In neither case was a carrier ordered to do or refrain from doing anything. In the light of these similarities the following discussion in *Charles Noeding Trucking Co.* v. *United States*, 29 F. Supp. 537, 543, reviewing the Commission's order in the latter case is particularly pertinent.

> . . . if the determination of exemption within the meaning of Section 203(b)(8) is purely an administrative function of the Commission this court is without jurisdiction of the pending cause. It would follow therefore, if this be correct, that if the plaintiffs should refuse to comply with the regulations imposed by the Motor Carrier Act while operating in the territory covered by the Commission's order the Commission would then be required to make a further order upon the plaintiffs to require them to comply with the regulatory provisions of the Act. Section 222(a) of the Act, 49 U.S.C.A. §322(a), however, provides that a penalty may be imposed upon any motor carrier which shall knowingly and wilfully violate any provision of the Act or any rule, regulation or order promulgated thereunder.
>
> The plaintiffs take the position that they are not required to incur penalties in order to test the validity of the exempt zone created by the Commission's order. They urge that the right to institute the pending suit is conferred upon them by the provisions of Section 205(h) of the Motor Carrier Act, 49 U.S.C.A. §305(h). This provides that "Any final order made under this chapter shall be subject to the same right of relief in court by any party in interest as is now provided in respect to orders of the Commission made under chapter 1 of this title." The right given to an interested party to review the orders of the Commission conferred by Section 208 of the Judicial Code (28 U.S.C.A. §46) is therefore car-

ried over into the Motor Carrier Act. The word "final" however is used to qualify the phrase "Any * * * order" occurring in Section 205(h). We therefore must first determine whether or not the order here made by the Commission is in its nature a final order. If it is such it follows, we think, that it was made in a "proceeding" within the meaning of Section 205(f) of the Motor Carrier Act.

We conclude that the order sub judice is a final order for since it at last defines the exempt zones and purports to remove the qualified exemption from certain municipalities which are in fact contiguous within the meaning of Section 203(b)(8) (for example Perth Amboy, Carteret, Linden and Elizabeth are physically contiguous to Richmond save only for the interposition of the Arthur Kill), its effect is to subject such carriers as do not comply with the regulations imposed by the Act to the penalties prescribed by the Act. The Commission's order therefore withdraws from the plaintiffs that partial immunity from regulation which they acquired by reason of the provisions of Section 203(b)(8). As was stated by the Supreme Court in the case of *Powell* v. *United States*, 300 U.S. 276, 285, 57 S.Ct. 470, 475, 81 L.Ed. 643, "* * * overemphasis upon the mere form of the order may not be permitted to obscure its purpose and effect." It cannot be denied that the plaintiffs have a pecuniary interest in the order and are affected substantially by its provisions. We deem a final order to be one which ends the action or proceeding before the tribunal which makes it, leaving nothing further to be determined by that tribunal or required to be accomplished other than the administrative execution of the decision. A correct analogy to this phase of the case at bar is supplied by those cases which deal with the rate making powers of the Commission for other interstate carriers. See *United States* v. *Los Angeles & S.L.R. Co.*, 273 U.S. 299, 309, 47 S.Ct. 413, 71 L.Ed. 651; *Procter & Gamble Co.* v. *United States*, 255 U.S. 282, 293, 32 S.Ct. 761, 56 L. Ed. 1091; *United States* v. *Chicago, M., St. P. & P. R. Co.*, 294 U.S. 499, 55 S.Ct. 462, 79 L. Ed. 1023.

> In the case of *Rochester Telephone Corporation* v. *United States*, 59 S.Ct. 754, 758, 83 L. Ed. 1147, decided April 17, 1939, the Supreme Court, by Mr. Justice Frankfurter stated: "* * * where the Commission's order denies an exemption from the terms of the statute, as in the Intermountain Rate cases, 234 U.S. 476, 34 S.Ct. 986, 58 L.Ed. 1408, the road to the courts' jurisdiction seems to be clear. There is a constitutional 'case' or 'controversy,' *Interstate Commerce Commission* v. *Brimson*, 154 U.S. 447, 14 S.Ct. 1125, 38 L.Ed. 1047; the requirements of equity are satisfied if disregard of the Commission's adverse action entails threat of oppressive penalties; and the suit is within the express language of the Urgent Deficiencies Act, in that it is one 'to enjoin, set aside, annul' an 'order of said commission.' 28 U.S.C. Secs. 46, 47, 28 U.S.C.A. §§46, 47. While the penalties may be imposed by the statute for its violation and not for disobedience of the Commission's order, a favorable order would render the prohibitions of the statute inoperative." Nor is the jurisdiction conferred by the Urgent Deficiencies Act limited to suits by carriers to avoid statutory penalties. Such suits may be maintained by other parties in interest. See *Claiborne-Annapolis Ferry Co.* v. *United States*, 285 U.S. 382 [52 S.Ct. 440, 76 L.Ed. 808]; *Mississippi Valley Barge L. Co.* v. *United States*, 292 U.S. 282, 293 [54 S. Ct. 692, 78 L.Ed. 1260].

It is apparent, therefore, that the district court erred in declining to review the Commission's order in the *Determination* case. This court's decisions in the *El Dorado* and *Powell* cases, as well as the *Noeding* decision, furnish ample and reliable precedent sustaining the judicial review of such an order of the Interstate Commerce Commission.

2. *The decision of the district court presents an inter-jurisdictional conflict.*

The decision of the district court in the subject proceeding that the order of the Interstate Commerce Com-

mission is not judicially reviewable presents a conflict with the decision of the United States District Court for the Southern District of Florida, in *Florida Gladiolus Growers Ass'n.* v. *United States,* 106 F.Supp. 525. Sitting as a three-judge statutory court, the court reviewed the Commission's order in the *Determination* case and restrained the Commission from enforcing that portion of it which declared horticultural commodities not to be agricultural commodities within the scope of Section 203(b)(6).

An examination of the briefs indicates, as in the instant case, that no jurisdictional objection was raised by any of the parties. This circumstance, no doubt, detracts from the weight of this case as an authority on the procedural issue. On the other hand, the question whether an action presents a justiciable controversy is one that the courts may raise *sua sponte* in order that the judicial process may not be abused. *Rochester Telephone Corporation* v. *United States,* 307 U.S. 125, 128, 59 S.Ct. 754, 756. Consequently the assumption of jurisdiction in the *Florida Gladiolus* case may be construed as constituting at least some indication that an action may be maintained under circumstances similar to those in the case at bar. It is possible, indeed, that the point did not occur to the court, since the matter was not brought to its attention by counsel. In any event, tacit or negative though it be, it is the latest expression of that court on this point. *Union Producing Company* v. *Federal Power Commission,* 127 F.Supp. 88, 93.

The confusion that results from these conflicting positions should be dispelled by the reversal of the judgment of the district court in the subject proceeding and the remanding of the matter to the district court for disposition on the merits.

3. *The decision of the district court promotes instability and confusion in the motor carrier industry.*

The reviewability of the report and order of the Interstate Commerce Commission in the *Determination* case was questioned by none of the parties to the proceeding before the district court. The matter was introduced *sua sponte* by the court itself. As a matter of fact, when questioned by the court and subsequently on supplemental briefs, counsel for the several litigants, including the Interstate Commerce Commission, the Department of Justice and the Secretary of Agriculture of the United States, expressed the unanimous view that the report and order in the *Determination* case was such a final "order" as could be reviewed by the court.

It could be expected that the complainant before the district court, Frozen Food Express, which had been denied the relief sought, would note its appeal to this Court, and it has done so. Intervenor in complainant's behalf, the Secretary of Agriculture of the United States, until now has seen fit to rely on the complainant's action, and yet has not noted his appeal from the district court's judgment.

The defendant in the district court, the Interstate Commerce Commission, also has noted its appeal to this Court notwithstanding that its order, assailed by the complainant, was not disturbed by the district court's decision. Similarly, intervenors in behalf of the I.C.C., American Trucking Associations, Inc., and the Common Carrier Conference Irregular Route and Contract Carrier Conference thereof, have noted their appeal.

The seemingly anomalous position of the Interstate Commerce Commission and intervenors in its behalf of

appealing from a judgment that declined jurisdiction to disturb an order of the Commission results from the implications inherent in the district court's action. It leaves unsettled the question of what processed agricultural commodities are embraced within the partial exemption of Section 203(b)(6) of the Interstate Commerce Act and what commodities are beyond its scope. The district court in its opinion suggests that the complainant motor carrier should transport fresh and frozen meat, fresh and frozen dressed poultry, feathers, shelled nuts, and cotton seed hulls, among other products, without having therefor an I.C.C.-issued certificate of public convenience and necessity authorizing such transportation. The court says that the Commission likely will seek injunctive relief to restrain the transportation. At that time the legality of the Commission's determination of the exempt status of the affected commodities could be tried.

According to Commissioner John L. Rogers there were in the United States on February 1, 1950, approximately 40,000 haulers of agricultural commodities, farm supplies and fish operating in interstate commerce as compared to 20,042 Commission-regulated carriers of property. *Eastern Motor Express* v. *United States,* 103 F.Supp. 694, 702. It is conceivable that the Commission would be required to bring suit against each one of the agricultural haulers, or at least against as many of them as would be necessary to establish for each agricultural commodity in the various stages of production in which it may be transported by motor carriers in interstate commerce whether the transportation is or is not subject to Commission regulation.

In each of these numerous court proceedings there would necessarily be a trial *de novo* of the question of the agricultural exemption. In each proceeding the Com-

mission would be required to construct anew a record upon which a restraining order or a criminal conviction could be based. The enormity of the Commission's task defies comprehension.

Conflicts between the many district courts and the several circuit courts of appeal in the interpretation of Section 203(b)(6) inevitably will arise. Ultimately such conflicts will need to be resolved by the Supreme Court of the United States. However, even the Supreme Court will have difficulty evolving a comprehensive definition of the statutory language of Section 203(b)(6) since before it will simply be the records pertaining to a single agricultural commodity in a particular stage of production. Indicative of the problem that will be encountered by this Court is the petition for certiorari, denied by this Court October 14, 1954, in No. 264, *I.C.C.* v. *Allen E. Kroblin, Inc.*, which presented the question of whether *fresh dressed poultry* is an exempt agricultural commodity and the appeal in the companion case to the instant one, similarly captioned, which presents the question of whether *fresh and frozen dressed poultry* is such an exempt product.

Until these conflicts and doubts respecting the hundreds of processed agricultural commodities are resolved by this Court, the motor carrier industry will be in a state of uncertainty and confusion. Motor carriers which have certificates or permits authorizing the transportation of specified processed agricultural commodities will find their franchises to be valueless when non-regulated carriers carry identical products at will. The rate structure established by regulated carriers of agricultural commodities will crumble in the face of unrestrained rate cutting by non-regulated carriers holding themselves out to haul identical commodities. Shippers of agricultural commodities won't know from one day to the next which carriers are available for hauling their products and what rates

will be charged. Ultimately the agricultural community and the public in general will suffer.

Such confusion and delay pending the litigation of countless suits can be avoided by a review of the Commission's decision in the *Determination* case wherein the meaning of the statutory language of Section 203(b)(6) was comprehensively interpreted and a long, detailed list of agricultural commodities, processed but not to the point of being manufactured, was published. The Commission's findings, if sustained by court review, will have the force and effect of law, will command universal obedience, and will put to rest the question of the scope of the partial exemption of Section 203(b)(6).

CONCLUSION

For the foregoing reasons it is urged that jurisdiction be noted and that the judgment of the district court be reversed and the case remanded to the district court for disposition on the merits.

Respectfully submitted,

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APPENDIX A

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

FROZEN FOOD EXPRESS, Plaintiff

EZRA TAFT BENSON,
SECRETARY OF AGRICULTURE
OF THE UNITED STATES,
Intervening Plaintiff

vs.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION,
Defendants

COMMON CARRIER IRREGULAR ROUTE
CONFERENCE OF AMERICAN TRUCKING
ASSOCIATION, ET AL,
Intervening Defendants

CIVIL ACTION NO. 8285

and

CIVIL ACTION NO. 8396

Phinney and Hallman (Carl L. Phinney), of Dallas, Texas; for plaintiff.

Stanley N. Barnes, Ass't. Attorney General, and Charles W. Bucy, Associate Solicitor, of Washington, D. C.; for Intervening Plaintiff.

Malcolm R. Wilkey, United States Attorney, of Houston, Texas, and Edward M. Reidy, Chief Counsel of Interstate Commerce Commission, of Washington, D. C.; for Defendants.

Callaway, Reed, Kidwell and Brooks (Rollo E. Kidwell), of Dallas, Texas; Todd, Dillon & Curtiss (Clarence D. Todd), of Washington, D. C.

Peter T. Beardsley, of Washington, D. C. Baker, Botts, Andrews and Shepherd (J. C. Hutcheson, III and Edwin N. Bell), of Houston, Texas; Macleay and Lynch (Francis W. McInerny), of Washington, D. C.

Reeder, Gisler & Griffin (Lee Reeder), of Kansas City, Missouri; J. W. Nisbet, of Chicago, Illinois; Carl Helmetag, Jr., of Philadelphia, Pa.; Rice, Carpenter & Carraway, of Washington, D. C.; Fulbright, Crooker, Freeman, Bates & Jaworski (W. H. Vaughan, Jr.), of Houston, Texas; for Intervening Defendants.

JANUARY 26, 1955

Before HUTCHESON, Chief Circuit Judge, and CONNALLY and KENNERLY, District Judges.

CONNALLY, District Judge.

Filed pursuant to Secs. 1336, 1398, and 2321-2325, of Title 28; to Sec. 1009, of Title 5; and to Sec. 305(g), of Title 49 U.S.C.A., each of the foregoing civil actions attacks and seeks to restrain enforcement of an order of the Interstate Commerce Commission. Presenting the same question of law, and substantial identity of parties, the actions were consolidated for hearing and trial. The question for determination is whether a number of different commodities, as later noted herein, all of which have their origin on the farm or ranch, fall within the scope of the so-called agricultural exemption, Sec. 203(b)(6) of Part II of the Interstate Commerce Act (Title 49 U.S.C.A. § 301 et seq.). By terms of the last-mentioned statute, motor vehicles used in carrying property consist-

ing of "ordinary livestock, fish (including shell fish), or agricultural (including horticultural) commodities (not including manufactured products thereof)", are exempt from Interstate Commerce Commission control (save for minor exceptions not here pertinent). The plaintiff in each of the consolidated actions, being a trucking concern holding a certificate of convenience and necessity from the Commission, desires to carry some or all of the commodities in question, unrestricted by the terms of its own certificate, or by other Commission regulation. Hence the plaintiff, supported to a considerable extent in this contention by the Secretary of Agriculture of the United States, urges upon the Court a broad interpretation of the statutory language "agricultural commodities (not including manufactured products thereof)", which would have the net result of enlarging this so-called agricultural exemption. The Commission, on the other hand, and those intervenors who align themselves with the Commission, urge upon us that most of the commodities in question, by virtue of the treatment and processing which they receive, either have lost their identity as "agricultural commodities", or have become "manufactured products thereof". The result of this argument is drastically to restrict the scope of the exemption.

Civil Action 8285:

In June, 1948, the Interstate Commerce Commission, of its own motion, instituted a proceeding, being MC-C-968 on its docket, in the nature of an investigation, to determine the meaning and scope of the term "agricultural commodities (not including manufactured products thereof)", as used in the above-mentioned statute. The proceeding was widely noticed in the affected trades and industries. Many interested parties, including the Secretary of Agriculture of the United States, the Commissioners of Agriculture from a number of the States, associations of shippers, motor carriers, and others, intervened.

After extended hearings, during which much expert testimony was offered as to the manner and method of cleaning, preparing, packaging, and otherwise processing the various commodities in question, the Commission issued its report and order entitled "Determination of Exempted Agricultural Commodities", 52 I.C.C. Reports, Motor Carrier Cases, 511-566. In such report, the Commission announced its definition of such statutory term,[1] which definition it then undertook to apply to the various commodities under consideration, and enumerated those which it found to come within the statutory language, and those which it found to fall without.[2] Thereupon, the

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[1] "In No. MC-C-968, we find that the term 'agricultural commodities (not including manufactured products thereof)' as used in section 203(b). (6) of the Interstate Commerce Act means: Products raised or produced on farms by tillage and cultivation of the soil (such as vegetables, fruits, and nuts); forest products; live poultry and bees; and commodities produced by ordinary livestock, live poultry, and bees (such as milk, wool, eggs, and honey), but not including any such products or commodities which, as a result of some treatment, have been so changed as to possess new forms, qualities, or properties, or result in combinations."

[2] "We find that the term 'agricultural commodities (not including manufactured products thereof)' as used in section 203 (b) (6) includes: (1) fruits, berries, and vegetables which remain in their natural state, including those packaged in bags or other containers, but excluding those placed in hermetically sealed containers, those frozen or quick frozen, and those shelled, sliced, shredded, or chopped up; (2) fruits, berries, and vegetables dried naturally or artificially; (3) seeds, including inoculated seeds, but not seeds prepared for condiment use or those which have been deawned, scarified or otherwise treated for seeding purposes; (4) forage, hay, straw, corn and sorghum fodder, corn cobs, and stover; (5) (a) hops and castor beans, and (b) leaf tobacco, but excluding redried tobacco leaf; (6) raw peanuts, and other nuts, unshelled; (7) whole grains, namely, wheat, rye, corn, rice, oats, barley and sorghum grain, not including dehulled rice and oats, or pearled barley, (8) (a) cotton in bales or in the seed, (b) cottonseed and flaxseed, and (c) ramie fiber, flax fiber, and hemp fiber; (9) live poultry, namely, chickens, turkeys, ducks, geese, and guineas; (10) milk, cream, and skim milk, including that which has been pasteurized, standardized milk, homogenized milk and cream,

proceeding was terminated and removed from the Commission docket.

The plaintiff Frozen Food Express was not a party to the proceeding before the Commission. By amended complaint filed here July 12, 1954, plaintiff alleges that it desires to carry agricultural commodities (not including manufactured products thereof) for hire, to and from all points within the United States, irrespective of the limitations imposed by its own certificate; that the report of April 13, 1951, deprives plaintiff of its right to do so. Alleging that the action of the Commission, in entering the report in question, was arbitrary, capricious and unreasonable, that it constituted an abuse of discretion and a violation of the Commission's statutory powers, the plaintiff here seeks an injunction to restrain the Commission and the United States from enforcing or recognizing the validity of such report; restraining interference with the plaintiff's proposed transportation of such agricultural commodities (not including manufactured products thereof), and seeks an order of this Court declaring the report of the Commission of April 13, 1951, to be null and void.

The Secretary of Agriculture has intervened, denominating himself "Intervening Plaintiff". He makes common cause with plaintiff in contending that a number of

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[2] (Cont'd.)
vitamin 'D' milk, and vitamin 'D' skim milk; (11) wool and mohair, excluding cleaned and scoured wool and mohair; (12) eggs, including oiled eggs, but excluding: whole or shelled eggs, frozen or dried eggs, frozen or dried egg yolks, and frozen or dried egg albumin; (13) (a) trees which have been felled and those trimmed, cut to length, peeled or split, but not further processed, and (b) crude resin, maple sap, bark, leaves, Spanish moss, and greenery; (14) sugar cane, sugar beets, honey in the comb, and strained honey."

commodities [3] are within the exemption. Several trucking associations, and some sixty southern and western railroad companies, have intervened. These interveniors take a contrary view, and support the report of the Interstate Commerce Commission.

We are of the opinion that the action may not be maintained, and must be dismissed, for the reason that the report and order of the Interstate Commerce Commission of April 13, 1951, is not an "order" subject to judicial review under any of the statutes cited. The proceeding before the Commission was not an adversary one. The order which initiated it purported to do no more than direct that an investigation be made of the meaning of the statutory language. Notice was given only to the public. When the final report and order was forthcoming some two years later, the only "order" entered was one discontinuing the proceeding and removing it from the Commission's docket. The question is controlled by U. S. v. Los Angeles & S. L. R. Co., 273 U.S. 299, 47 S.Ct. 413, 414, 71 L.Ed. 651, holding a very similar "order" of the Interstate Commerce Commission which found, after an investigation, the value of certain railroad properties, not to be subject to review. The language of Mr. Justice Brandeis, speaking for a unanimous Court there, aptly describes the order in issue here:

"The so-called order here complained of is one which does not command the carrier to do, or to refrain from doing, any thing; which does not grant or withhold any authority, privilege, or license; which does not extend or

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[3] "(1) Slaughtered meat animals and fresh meats;
(2) Dressed and cut-up poultry, fresh or frozen;
(3) Feathers;
(4) Raw shelled peanuts and raw shelled nuts;
(5) Hay chopped up fine;
(6) Cotton linters and cottonseed hulls;
(7) Frozen cream, frozen skim milk, and frozen milk;
(8) Seeds which have been deawned, scarified, or inoculated."

abridge any power or facility; which does not subject the carrier to any liability, civil or criminal; which does not change the carrier's existing or future status or condition; which does not determine any right or obligation. This so-called order is merely the formal record of conclusions reached after a study of data collected in the course of extensive research conducted by the Commission, through its employees. It is the exercise solely of the function of investigation."

The proponents of jurisdiction here rely upon Columbia Broadcasting System v. U. S., 316 U.S. 407, 62 S.Ct. 1194, 86 L.Ed. 1563. It was there held that an order of the Federal Communications Commission promulgating certain rules and regulations requiring that the Commission deny a license to broadcasting stations under certain circumstances, was subject to judicial review, upon a showing by the complaining party of strong equitable considerations. This authority is clearly distinguishable from the present case. The order there in question was entered in the exercise of the agency's rule-making power. Such orders, together with those fixing rates and those determining controversies before the administrative body, have long been recognized as subject to review, U. S. v. Los Angeles & S. L. R. Co., supra.

Likewise, the complaining party there showed an immediate and continuing threat of irreparable injury if the order were not reviewed. It is not so here. The statement of plaintiff that it desires to carry for hire most or all of the commodities on the Commission's proscribed list, and that if it does so, the Commission likely will seek injunctive relief to restrain plaintiff, shows no basis for the intervention of a court of equity. Plaintiff will have an adequate remedy in the event of such interference.

It follows that Civil Action 8285 will be dismissed.

Civil Action 8396:

A complaint was filed December 23, 1953, with the Interstate Commerce Commission by East Texas Motor Freight Lines, Gillette Motor Transport, Inc., and Jones Truck Lines, Inc., charging that Frozen Food Express was and had been engaged in transporting fresh and frozen dressed poultry, and fresh and frozen meats, and meat products, for hire, between points in interstate commerce not authorized by its certificate of convenience and necessity. Frozen Food readily admitted that it had been so engaged, but defended on the theory that such products all were within the agricultural exemption. The Commission found each of these products not to be within the exemption, and ordered Frozen Food Express to cease and desist from such unauthorized transportation. The present proceeding was filed by Frozen Food Express to review that order.[4]

While the present action was pending in this Court, the Secretary of Agriculture of the United States filed with the Commission his petition for leave to intervene, pursuant to Sec. 1291, of Title 7 U.S.C.A. This request was denied; and the Secretary appears here as "Intervening Plaintiff", contending (1) that the proceedings before the Commission were null and void by reason of the failure of the Commission to notify him of the pendency thereof, Sec. 1291(a), of Title 7 U.S.C.A.; (2) that the proceedings should be remanded to the Commission by reason of its error of law in having denied him leave to intervene; and (3) that the cease and desist order should be enjoined by reason of the alleged error of the Commission in holding fresh and frozen meats, and fresh and frozen dressed poultry, to be beyond the limits of the agricultural exemption.

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[4] Plaintiff has abandoned the contention that meat products are within the agricultural exemption, and this commodity will not be further considered here.

The rail carriers and trucking associations which intervened in Civil Action 8285, also appear in this action. They support the Commission, and oppose the position taken by the plaintiff and the Secretary of Agriculture.

Armour & Company, being engaged at various points in the United States in the slaughter of livestock and the killing, dressing, and sale of poultry, has intervened, urging that dressed poultry is an exempt commodity, that meat is not.

The position taken by the Secretary of Agriculture that the proceeding before the Commission was null and void in its entirety by reason of the failure of the Commission to give him notice thereof, need not long detain us. The proceeding there was not one with respect to "rates, charges, tariffs, and practices" relating to the transportation of farm products, and hence was not one of which the Secretary was entitled to notice under the statute. Secs. 1291 and 1622, of Title 7 U.S.C.A. U. S. v. Pennsylvania R. Co., 242 U.S. 208, 37 S. Ct. 95, 61 L.Ed. 251; Baltimore & Ohio R. Co. v. U. S., 277 U.S. 291, 292, 48 S.Ct. 520, 72 L.Ed. 885; Missouri Pac. R. Co. v. Norwood, 283 U.S. 249, 51 S.Ct. 458, 75 L.Ed. 1010. The Commission likewise did not commit an error of law in denying the Secretary's Petition of Intervention, filed there while the present proceeding was pending here.

Most able and exhaustive treatment is given the question now before us, in so far as it concerns dressed poultry, by Judge Gavin of the United States District Court for the Northern District of Iowa, in Interstate Commerce Commission v. Allen E. Kroblin, Inc., 113 F. Supp. 599, 600, affirmed, 8 Cir., 212 F.2d 555, certiorari denied 348 U.S. 836, 75 S.Ct. 49. Reviewing the long struggle between the Interstate Commerce Commission in its efforts to restrict the application of the exemption in question, and the Department of Agriculture and others

in seeking to expand it; reviewing the legislative history of the Motor Carrier Act of 1935, and various proposed amendments thereto; and considering the congressional intent which prompted the insertion of the agricultural exemption, Judge Gavin concluded that dressed poultry constituted an "agricultural commodity", and did not constitute a "manufactured product thereof". Hence, such commodity was within the exemption. It is sufficient to state that we agree with those conclusions as to fresh and frozen dressed poultry.

Counsel for the Commission urges that this Court should disregard the Kroblin case, on the argument that the only question before us is one of the adequacy of the evidence before the Commission. It is said that the order which was entered was one within the general purview of the Commission's authority, and that if its findings are supported by "substantial evidence", this Court has no alternative but to leave it undisturbed. While we do not quarrel with such statement as a general proposition of law, the argument is not convincing in its application to the present record. The primary facts before the Commission were without dispute and were the subject of stipulation. Reduced to simplest form, they showed that before a chicken or duck became "dressed poultry", the bird was killed, his feathers and entrails removed, he was chilled, and in some cases frozen, packaged, etc. In addition, such "facts" consisted of evidence of so-called "expert" nature, that this treatment or processing of the chicken or duck rendered him a "manufactured product".

It is apparent that there is only one ultimate finding called for, namely, whether under the type of processing reflected by the record, the product falls within the statutory definition. The question then is a mixed one of law and fact, calling for the application of the processes of legal reasoning and of principles of statutory construction. The fact that the Commission's findings are

supported by an "expert" who gives his opinion that a dressed chicken is a manufactured product, does not foreclose the question, nor remove it from the scope of judicial review. Baumgartner v. U. S., 322 U.S. 665, 64 S.Ct. 1240, 88 L.Ed. 1525; Lehmann v. Acheson, 3 Cir., 206 F.2d 592; Galena Oaks Corp. v. Scofield, 5 Cir., 218 F.2d 217.

In our opinion, fresh and frozen meat does not fall within the category either of "ordinary livestock" or of "agricultural commodities", and hence is not within the exemption. Since the enactment of Part II of the Interstate Commerce Act in 1935, motor vehicles used exclusively in carrying "livestock, fish (including shell fish), or agricultural commodities (not including manufactured products thereof)", have been exempt. By amendment in 1940, the term "ordinary" was inserted immediately before the word "livestock". The term "ordinary livestock" is defined in Sec. 20(11) of the Act as "all cattle, swine, sheep, goats, horses, and mules, except such as are chiefly valuable for breeding, racing, show purposes, or other special uses".

Referring only to the live animals, "ordinary livestock" may not be tortured to include the carcasses of slaughtered meat animals, or the meat which is the product of butchering. Meat has been regarded generally in the industry as a controlled commodity for some twenty years. Congress has dealt with the agricultural exemption on many occasions. Considering the ease with which the Congress might have added appropriate language to evidence its intent to exempt fresh or frozen meat from Interstate Commerce Commission control, if it so desired the absence of such language indicates that no such intent was entertained.

Nor may meat, fresh or frozen, be considered an "agricultural commodity" for present purposes. The exemp-

tion has treated the live meat animal in a separate generic class from "agricultural commodity" since the enactment of the statute; and if the live animal, on entering the slaughter pen or the packing house, is not an "agricultural commodity", we are unable to see how he becomes one on emerging therefrom in the form of beef or pork. The Commission was correct, in our opinion, in holding fresh and frozen meat to be non-exempt.

The enforcement of the order of the Interstate Commerce Commission, MC-C-1605, East Texas Motor Freight Lines, Inc., et al. v. Frozen Food Express, is enjoined and restrained in so far as said order interfered with, enjoins or restrains the plaintiff Frozen Food Express from transporting fresh and frozen dressed poultry in interstate commerce (when the motor vehicles used in carrying such poultry are not used for carrying any other property or passengers for compensation). Other relief sought by plaintiff is denied.

Clerk will notify counsel.

KENNERLY, District Judge (concurring in part and dissenting in part).

I concur with all the foregoing opinion except the decision in Civil Action 8396 with respect to fresh meat and frozen meat. As to that I respectfully dissent.

I think all of Section 303(b) should be given a broad and liberal construction, and that Section 303(b) (6) should be construed as including fresh meat and frozen meat. I think we should not only follow the reasoning of both the District Court and Court of Appeals in the Kroblin case with respect to dressed poultry and frozen dressed poultry, but that what is said is also applicable to fresh meats and frozen meats.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

FROZEN FOOD EXPRESS, ET AL.,
Plaintiffs,

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
ET AL., *Defendants.*

Civil Action No. 8285

Judgment

This action, to enjoin and set aside an order of the Interstate Commerce Commission, having come on for final hearing on November 16, 1954, before a duly constituted three-judge District Court, convened pursuant to Sections 2284 and 2321-2325, Title 28, United States Code, consisting of the undersigned judges; and the Court having considered the pleadings and evidence, and the briefs and arguments of counsel for the respective parties, and being fully advised in the premises; and having on January 26, 1955, filed herein its opinion, holding that the order sought by the plaintiffs to be set aside and enjoined is not an order subject to judicial review under any of the said statutes; now, in accordance with the said opinion, it is hereby

ORDERED, ADJUDGED, AND DECREED that the relief prayed for by the plaintiffs, including the Secretary of Agriculture as an intervening plaintiff, be, and

the same hereby is, denied, and their complaints be, and the same hereby are, dismissed.

This the 23rd day of February, 1955.

/s/ JOSEPH C. HUTCHESON, JR.
Chief Judge, United States
Court of Appeals for the
Fifth Circuit

/s/ THOMAS M. KENNERLY
United States District Judge

/s/ BEN C. CONNALLY
United States District Judge